BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EUGENE R. DOUTHIT Claimant VS. **INTERSTATE BRANDS CORPORATION** Respondent AND **KEMPER INSURANCE COMPANY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	Docket No. 168,044

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Alvin E. Witwer on October 3, 1995. The Appeals Board heard oral argument February 20, 1996.

APPEARANCES

Claimant appeared by his attorneys, Edward B. Rucker of Kansas City, Missouri, and John B. Rathmel of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Rex W. Henoch of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Patrick J. Gregory of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

The parties have asked the Appeals Board to review determinations by the Administrative Law Judge relating to:

(1) Average weekly wage; and
(2) Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments of the parties at oral argument, the Appeals Board finds and concludes:

(1) Claimant's average weekly wage was $485.75.

The evidence indicates claimant was paid on a "per mile" basis. The determination regarding his average weekly wage is, therefore, governed by K.S.A. 44-511(5) which provides in pertinent part as follows:

> "If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be . . . ."

Claimant began working on April 10, 1992 and was injured on April 20, 1992. Claimant would, therefore, have worked for respondent for a total of ten days prior to the date of accident. Claimant did not introduce evidence to show the total earnings for those ten days. The evidence does show claimant's first pay was for a nine-day period of April 10, 1992 through April 18, 1992, in the amount of $626.62. He was paid for a seven-day interval thereafter. The next paycheck covered the period April 19, 1992 through April 25, 1992, and was in the amount of $469.13.

Respondent argues that the average weekly wage should be calculated by dividing the $626.62 by 1.29, the weeks covered by that paycheck, to arrive at an average weekly wage of $485.75. Claimant, on the other hand, argues that the Appeals Board should affirm the finding by the Administrative Law Judge that claimant's average weekly wage was $626.62. Claimant argues this finding is supported in part by the absence of data which would permit precise adherence to the statute and further supported by the fact that claimant's pay after the accident averaged somewhat more than the $626.62 per week.

The Appeals Board finds that the method proposed by the respondent adheres more closely to the statutory requirements. The statute calls for calculations based upon earnings prior to the date of accident. The only pay period in evidence prior to the injury is the nine days, or 1.29 weeks. The Appeals Board, therefore, finds claimant's average weekly wage was $485.75.

(2) The Appeals Board finds claimant has a 68.5 percent permanent partial general disability.

Claimant, an over-the-road truck driver, injured his low back on April 20, 1992 while unloading his trailer. The rack he was moving down the ramp from his trailer turned over. When he caught it and pulled it back up he injured his low back. Claimant continued to work for respondent through May 7, 1992 when he was no longer able to perform the duties. He had not returned to any type of employment at the time this claim was submitted to the Administrative Law Judge for decision.

Claimant was treated by Dr. Daniel M. Downs, an orthopedic surgeon. Dr. Downs performed low back surgery on claimant on November 17, 1992. Claimant did not do well following the surgery and Dr. Downs gave the claimant the option of additional surgery which would have included a spinal fusion and insertion of metal hardware. Claimant chose not to undergo the second surgery.

Dr. Downs rated claimant's impairment as 25 percent of the body as a whole. He also recommended restrictions. Specifically, he recommended claimant not lift greater than ten pounds on a repetitive basis or 50 pounds on an occasional basis. It was also Dr. Downs' opinion claimant would not be able to sit for long periods of time and would need to alternately stand and sit or otherwise change his position.

Dr. Edward Prostic examined the claimant at the request of claimant's counsel. He rated claimant's impairment at 30 to 35 percent to the body as a whole. He agreed with the restrictions recommended by Dr. Downs.

The parties stipulated to a 28.75 percent functional impairment to the body as a whole as a result of the accidental injury sustained on April 20, 1992.

Two witnesses testified regarding the effect of claimant's injury on his ability to obtain employment and earn wages. Donald R. Vogenthaler, Rh.D., testified that, in his opinion, claimant's injury resulted in a 100 percent loss of ability to obtain employment in the open labor market and a 100 percent loss of ability to earn comparable wages. He based his opinions on the restrictions of Dr. Downs and additional information he obtained from the claimant. Michael J. Dreiling, vocational counsellor, testified on behalf of respondent's insurance carrier. He concluded claimant sustained a 56 percent loss of access to the open labor market and an approximate wage loss of 56 percent. The wage loss opinion was based upon a comparison of a projected post-injury wage of $6.00 per hour and a $550.00 pre-injury wage, the wage Mr. Dreiling understood from information provided to him.

The Administrative Law Judge found the claimant suffered a 78 percent loss of ability to obtain employment in the open labor market. This conclusion appears to have been reached by giving approximately equal weight to the opinions of the two vocational experts. Respondent argues that the opinion of Dr. Vogenthaler should be completely disregarded. Respondent challenges Dr. Vogenthaler's opinion primarily because Dr. Vogenthaler did not rely exclusively on the medical restrictions and considered additional limitations based upon information solely from the claimant. According to respondent, Dr. Vogenthaler assumed claimant had to take naps each day. Respondent asserts that claimant's credibility is highly suspect due to the fact he denied having previous back problems.

Respondent's arguments do not, in our opinion, give a complete description of Dr. Vogenthaler's testimony. Dr. Vogenthaler testifies that claimant sustained a nearly 100 percent loss of access to the open labor market based upon restrictions of Dr. Downs and one additional factor based upon his interview with claimant. The additional factor was that

claimant could not stand for extended periods of time, and he specifically could not stand for as much as six hours per day. Based upon the restrictions of Dr. Downs and that additional factor, Dr. Vogenthaler reached his conclusion that claimant has a 99 percent loss of access to the open labor market. He does additionally testify that if you assume claimant has to lie down for extended periods of time, several times a day, the loss would be 100 percent. The difference is significant. If we were required to believe claimant must take naps several times per day, for several hours at a time, we would be required to place great emphasis on claimant's credibility. The conclusion that claimant cannot stand for up to six hours a day does not, on the other hand, require the same reliance solely upon claimant's testimony. This limitation is substantially consistent with other evidence in the case, including Dr. Downs' recommendation, with which Dr. Prostic agreed, that claimant alternate standing and sitting. Under these circumstances the Appeals Board does not consider it appropriate to completely disregard Dr. Vogenthaler's opinion.

Respondent advances several other reasons for disregarding Dr.Vogenthaler's opinion. These include the fact that Dr. Vogenthaler did not apply any preexisting restrictions to determine the pre-injury labor market, he eliminated certain job categories on the basis of his judgement that claimant was not suited for those positions and finally, his opinions did not factor in accommodated work required by the Americans with Disabilities Act. Again, the Appeals Board does not consider these factors sufficient to disregard Dr. Vogenthaler's opinion. Although evidence indicates claimant did have prior difficulty with his back, there is no evidence of work restrictions either recommended or in fact, operating on his employment. Dr. Vogenthaler does acknowledge that he excluded certain positions from the labor market on the basis of claimant's apparent disposition. However, he excluded both those from the pre-injury labor and the post-injury labor markets. The respondent has not established that he did so inappropriately. Finally, Dr. Vogenthaler, in effect, testifies that mandated accommodation is, in part, factored in by the use of the Dictionary of Occupational Titles and its reliance upon essential job functions.

In summary, the challenges made by respondent do give some basis for not adopting Dr. Vogenthaler's conclusions, but not a basis for discounting them more than is done by giving them equal weight with those of Mr. Dreiling. The Appeals Board, therefore, agrees with and finds that claimant sustained a 78 percent loss of access to the open labor market. This conclusion is reached by giving equal weight to Dr. Vogenthaler's opinion that claimant sustained a 99 percent loss of access to the open labor market, and Mr. Dreiling's opinion that claimant sustained a 56 percent loss of access to the open labor market.

The Administrative Law Judge also found that claimant sustained a 68 percent loss of ability to earn a comparable wage, but does not state how that conclusion was reached. Mr. Dreiling testifies that claimant could earn from minimum wage to $6.00 per hour. Dr. Vogenthaler gives no opinion other than that of 100 percent loss. Upon reviewing the record, the Appeals Board finds that $5.00 per hour, or $200.00 per week, more likely assesses claimant's ability to earn a wage. The record shows he has a ninth grade education and subsequently failed to pass a GED examination. His work history consisted almost entirely truck driving work and construction labor. Based upon his education, work history, as well as the opinions of Dr. Vogenthaler and Mr. Dreiling, the Appeals Board concludes claimant sustained a 59 percent loss of ability to earn a comparable wage. This conclusion is based upon a comparison of $5.00 per hour, or $200.00 per week, as a projected post-injury wage and the pre-injury wage of $485.75.

By giving equal weight to the loss of ability to earn a comparable wage and loss of access to the open labor market, the Appeals Board finds and concludes claimant has suffered a 68.5 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated October 3, 1995 is hereby modified:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Eugene R. Douthit, and against the respondent,Interstate Brands Corporation, and its insurance carrier, Kemper Insurance Company, for an accidental injury which occurred April 20, 1992 and based upon an average weekly wage of $485.75, for 69.71 weeks of temporary total disability compensation at the rate of $289.00 per week or $20,146.19, and 2.57 weeks at the rate of $93.11 per week or $239.29 for a 28.75% permanent partial general body impairment of function for the period April 20, 1992 to May 8, 1992; followed by 342.72 weeks at the rate of $221.84 for a 68.5% permanent partial disability or $76,029.00 for a total award of $96,414.48.

As of March 29, 1996, there is due and owing claimant 69.71 weeks of temporary total disability at $289.00 per week, or $20,146.19, followed by 2.57 weeks of permanent partial disability compensation at the rate of $93.11 per week or $239.29; followed by 133.29 weeks of permanent partial disability compensation at the rate of $221.84 per week in the sum of $29,569.05, for a total of $49,954.53 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $46,459.95 is to be paid for 209.43 weeks at the rate of $221.84 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Edward B. Rucker, Kansas City, MO
John B. Rathmel, Overland Park, KS
Rex W. Henoch, Kansas City, KS
Patrick J. Gregory, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director